IN THE

# Supreme Court of the United States

October Term, 1961

No. .....

DARYL THOMAS KEMP,

*Petitioner,*

vs.

STATE OF CALIFORNIA,

---

Petition for Writ of Certiorari to the State of California and to the Supreme Court of the State of California.

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IN THE

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October Term, 1961

No. .....

DARRYL THOMAS KEMP,

*Petitioner,*

*vs.*

STATE OF CALIFORNIA,

## Petition for Writ of Certiorari to the State of California and to the Supreme Court of the State of California.

Petitioner, Darryl Thomas Kemp, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of California, which said judgment of said Supreme Court of California affirmed a conviction, in Count I of the murder of one Marjorie Hipperson as charged, in Counts II and III of the crime of rape and kidnapping, and of the crime of forcible rape in Count V. The defendant was found sane at the time of the commission of the offenses, and in a separate proceeding, required by Section 190.1 of the Penal Code of California, the jury imposed the death penalty on Count I. The appeal is automatic under the provisions of Section 1239, subdivision (b) of the Penal Code of California.

Pursuant to the appeal, the judgment just hereinabove referred to and the orders denying the motion for new trial were affirmed. (See opinion of the Supreme Court of the State of California, filed March 2, 1961, reported at 55 A. C. 459.)

A Petition for Rehearing was filed March 17, 1961, and denied March 29, 1961 (Minutes, Supreme Court, 55 A. C.)

Subsequently, Writs of Habeas Corpus, or, in the alternative, for Error Coram Nobis, were filed May 1, 1961, denied May 10, 1961; a second such petition was filed June 1, 1961, and denied June 6, 1951; and the third such Petition was filed July 28, 1961, and denied August 9, 1961.

Copies of said Writs, duly certified by the Clerk of the Supreme Court of the State of California, are contained in the supplemental volume to the record filed with the Clerk of this Court.

## Opinion Below.

The opinion of the Supreme Court of the State of California was rendered March 2, 1961, and is reported at 55 A. C. 459. Copy of which is attached as Appendix A.

The Petition for Rehearing was filed March 17, 1961, and denied March 29, 1961 (See Minutes, Supreme Court of California, 55 A. C.)

The first Writ of Habeas Corpus was filed May 1, 1961, and denied May 10, 1961; the second Writ of Habeas Corpus was filed June 1, 1961, and denied June 6, 1961; and the third Writ of Habeas Corpus was filed July 28, 1961, and denied August 9, 1961.

Copies of said Writs appear in the record transmitted to this Court as certified by the Clerk of the Supreme Court of the State of California.

## Jurisdiction.

I.

The judgment of the Supreme Court of the State of California was dated March 2, 1961, and is to be found reported in 55 A. C. 459. A Petition for Rehearing was denied by the Supreme Court of California on March 29, 1961, and is reported in 55 A. C. Reports.

II.

Petition for Writs of Habeas Corpus, or, in the alternative, for Error Coram Nobis, were filed on May 1, 1961, June 1, 1961, and July 28, 1961.

III.

Applications to this Court for extension of time to file the Petition for Writ of Certiorari were granted, and a final order extending time for the filing of the Petition for Writ of Certiorari was granted extending the time to August 26, 1961.

IV.

The statutory provisions believed to confer upon this Court jurisdiction to review the judgment in question by Writ of Certiorari are 28 U. S. C., Section 2101(d), and Rule 22(1) of this Court.

## Questions Presented.

1. The Court erred in permitting the defendant to proceed to trial on the Indictment charged in Count I, murder of Marjorie Hipperson on or about June 10, 1957; Count II, forcible rape of E. Helen Shelton on or about July 15, 1959; Count III, kidnaping E. Helen Shelton on or about July 15, 1959; Count IV, forcible rape of Lelah D. Sherman on or about May 12, 1959; and Count V, rape on or about May 12, 1959, of Lelah D. Sherman, when the common elements of intent, persons involved, time and place were lacking. The accused was thus denied that fair and impartial trial guaranteed by due process as provided by the Fourteenth Amendment to the Constitution of the United States.

2. The evidence was insufficient to establish Count I, the charge of murder. The defendant-petitioner was not competent to form an intent. The Supreme Court erred in holding that the evidence was sufficient, and in particular in denying to this petitioner a hearing as prayed for in the Writ of Habeas Corpus, or, in the alternative, for a Writ of Error Coram Nobis, or for a rehearing.

3. The taking of blood samples and secretions from Kemp and the use in the trial of the testimony of Officer Pinker with reference to the results of such tests amounts to an unlawful search and seizure. It was in violation of the privacy of the defendant and constituted violations of the Fourth and Fifth Amendments to the Constitution of the United States, and in fact Article I, Section 19, of the Constitution of the State of California, to which the Supreme Court of the State of California apparently gave little credit.

## Statutes Involved.

The text of these statutes is set forth in the appendix to this Petition:

Section 187, Penal Code, California (murder).

Section 190.1, Penal Code, California (method of fixing penalty for murder).

Section 1239, Subd. (b) (automatic appeal in death cases in California).

Section 948, Penal Code, California (method of pleading).

Section 954, Penal Code, California (section permitting the charging of one or more offenses in separate counts, but only when they are connected together in their commission).

## Statement of the Case.

By an Indictment filed by the Grand Jury of the County of Los Angeles, your petitioner was charged in Count I with the murder of Marjorie Hipperson on or about the 10th day of June, 1957, in violation of Section 187 of the Penal Code of the State of California; in Count II of the crime of forcible rape in violation of Section 261, Subd. 3, of the Penal Code of the State of California, alleging the act to have occurred on the 15th day of July, 1959; in Count III of the crime of kidnapping, in violation of Section 207 of the Penal Code; in Count IV of the crime of forcible rape, in violation of Section 261, Subd. 3, of the Penal Code; and in Count V of the crime of forcible rape, in violation of Section 261, Subd. 4 [Clk. Tr. pp. 1-9, Record on Appeal].

After a trial by jury, the defendant was convicted in Count I of the murder of Marjorie Hipperson; in Count II of forcible rape; in Count III of the crime of kidnapping Ethel Helen Shelton; in Count V of rape accompanied by threats of bodily harm to Diane Lelah Sherman on May 12, 1959.

The jury acquitted the defendant of the charge contained in Count IV, but convicted him of murder in the first degree on Count I, of rape on Counts II and III; and of forcible rape on Count V.

The trial was resumed by the same jury upon the issue of insanity, and the jury returned the verdict finding the defendant sane at the time of the commission of the offenses charged [Clk. Tr. pp. 154-158, Record on Appeal].

Thereafter, the same jury determined the penalty for the commission of murder as charged in Count I as death [Clk. Tr. pp. 180, 181, Record on Appeal].

A motion for new trial was duly made; a motion to reduce the penalty from death to life imprisonment was made; and a motion for the Court to declare as to the doubt as to the present sanity of the defendant was made and denied [Clk. Tr. pp. 186, 187, Record on Appeal]. Judgment as to Counts I, II, III and V [Clk. Tr. pp. 194, 195, Record on Appeal]. Death sentence judgment [Clk. Tr. pp. 196-202, Record on Appeal].

## Specifications of Error.

1. The Court erred in permitting the defendant to proceed to trial on the indictment charged in Count I, murder of Marjorie Hipperson on or about June 10, 1957; Count II, forcible rape of E. Helen Shelton on or about July 15, 1959; Count III, kidnaping E. Helen Shelton on or about July 15, 1959; Count IV, forcible rape of Lelah D. Sherman on or about May 12, 1959; and Count V, rape on or about May 12, 1959, of Lelah D. Sherman, when the common elements of intent, persons involved, time and place were lacking. The accused was thus denied that fair and impartial trial guaranteed by due process as provided by the Fourteenth Amendment to the Constitution of the United States.

2. The evidence was insufficient to establish Count I, the charge of murder. The defendant-petitioner was not competent to form an intent. The Supreme Court erred in holding that the evidence was sufficient, and in particular in denying to this petitioner a hearing as prayed for in the Writ of Habeas Corpus, or in the alternative, for a Writ of Error Coram Nobis, or for a rehearing.

3. The taking of blood samples and secretions from Kemp and the use in the trial of the testimony of Officer Pinker with reference to the results of such tests amounts to an unlawful search and seizure. It was in violation of the privacy of the defendant and constituted violations of the Fourth and Fifth Amendments to the Constitution of the United States, and in fact Article I, Section 19, of the Constitution of the State of California, to which the Supreme Court of the State of California apparently gave little credit.

## Statement of Facts Pertinent to the Appeal.

As heretofore stated, in Count I of the Indictment, the petitioner was charged with the murder of Marjorie Hipperson on or about June 10, 1957. Summarized, she was found dead in bed, apparently she had been choked, and there was testimony to the effect that someone had had sexual relations with her. The defendant-petitioner was jointly charged in another count with the crime of forcible rape on one Ethel Helen Shelton on or about July 15, 1959, some two years and one month after the Hipperson occurrence, which took place June 10, 1957. In Count III the petitioner was charged with kidnapping Ethel Helen Shelton on or about July 15, 1959; in Count IV with forcible rape of Diane Lelah Sherman on or about May 12, 1959; and in Count V of rape on or about May 12, 1959 of Diane Lelah Sherman.

The evidence pertinent to this transaction other than as just briefly summarized is to the effect that Marjorie Hipperson was a nurse and she was discovered by a doctor friend lying dead after she had been missing for some hours, and after an examination by the officers it appeared that she had been strangled and that someone had had sexual relations with her.

After Kemp was arrested, he was taken to the apartment of the Hipperson woman by the officers; he denied he had ever been there. Testimony was offered by fingerprint experts to the effect that they found on the wall of the Hipperson apartment a palm print which, in the opinion of the experts, was that of the defend ant, your petitioner Kemp. Ray H. Pinker, a forensic chemist for the Los Angeles Police Department for some thirty years, testified he went to the apartment

occupied by the Hipperson woman on June 10, 1957; he saw a body on the bed; that he observed the body and noticed there was a rope made of a silk stocking around the throat and attached to this was a blue wash cloth; there were burn marks on the corner of the mouth; the left arm was underneath the body; on her right wrist was another silk stocking which was tied about the wrist. He also noticed some fluid coming from the vagina; he procured a vial and caught some of that fluid [Rep. Tr. pp. 867-870. Record on Appeal]. The fluid from the vagina he kept in his laboratory and made a chemical test, which was positive. He procured a sample of blood from the victim and made an examination for blood group; found the victim's blood to be "O". He was unable to get a blood group for the semen, nor was he able to get any other reaction. This meant to him that the blood group of the semen was that of either an "O" person or a non-secreter of one of the other three blood types, A, B and A-B. On July 17, 1959, he met Detective Close, one of the officers on the case at Central Receiving Hospital where they obtained a sample of blood from the defendant prior to this he had obtained a sample of saliva from the defendant at the crime laboratory the blood sample was taken from the defendant [Rep. Tr. pp. 872-873. Record on Appeal]. The defendant sat down on a table, a nurse put a rubber tube around his arm, inserted a hypodermic needle attached to a syringe, and withdrew some of the blood, transferred that blood to a vial and turned it over to Sgt. McCaulley and himself of the Crime Laboratory; the defendant sat there mute while this was done. He then analyzed the blood that was taken from the defendant [Rep. Tr. pp. 873-874. Record on Ap-

peal]. He stated that he examined the blood taken from Mr. Kemp and that it was of the blood group A; he stated that a secreter is either agglutenagen A or agglutenagen B or both, whichever happens to be present in the blood and it is also found in the secretions of that person. In a nonsecreter the agglutenagen genes are present in the blood but are not found in the secretions; that by secretions from that person he meant saliva, urine, seminal fluid, tears, milk, anything in the nature of a secretion from the body; he found from an examination of the spermatozoa from the vagina of Marjorie Hipperson; that it was a nonsecreter type; he was unable to determine the presence of either agglutenagen A or agglutenagen B which left the identity of the person whose semen it was to be "O" because in "O" it is either of agglutenagen "A", "B-A" or "B" that are present, which meant that the fluid that came from a non-secreter was any of the three groups, "A", "B" or "A-B". He stated that he determined from the saliva of Mr. Kemp that he was a non-secreter. He stated on that basis the tests are used for exclusion; that you cannot positively identify a person from that type of test. In other words, you can't say it was a certain person, but he couldn't exclude him either. He was not able to exclude Mr. Kemp by reason of these tests [Rep. Tr. pp. 878, 879. Record on Appeal].

## Summary of Argument.

1. The Court erred in permitting the defendant to proceed to trial on the indictment wherein murder was charged as having occurred June 10, 1957; Count II was forcible rape on or about July 15, 1959; Count III was kidnapping on or about July 15, 1959; Count IV forcible rape on May 12, 1959; Count V was rape on or about May 12, 1959. The common elements of intent, persons involved, time and place, were lacking. The accused was denied a fair trial by reason of this hodge-podge combination of unrelated offenses. It is our contention that Section 954 of the Penal Code of California does not permit the prosecution to file an accusatory pleading relating several unrelated offenses spread over a period of more than two years.

2. The evidence was insufficient to establish Count I, the charge of murder. The defendant-petitioner was not competent to form an intent. The Supreme Court of California erred in holding that the evidence was sufficient, in view of the fact that the only substantial evidence before the Court was a latent palm print. The Supreme Court erred in denying the petitioner a hearing as prayed for in the Writ of Habeas Corpus and for a Rehearing. By reason of the fact that evidence came to hand at almost the last moment to the effect that the defendant, your petitioner, has demonstrated by brainwave studies, had not been and is not fully responsible. Surely, we were entitled to a hearing upon this issue and a re-trial upon the issue of not

guilty by reason of insanity. The defendant, as a minimum, was entitled to a new trial on that issue.

3. The taking of blood samples and secretions from Kemp, a man not responsible for his acts, and there is substantial evidence in the record which shows that he had been mentally ill for years, and as it now appears from the newly discovered evidence he had been incompetent for years, was hardly responsible for any of his acts. He certainly could not have consented to the taking of the blood sample and the saliva sample. Officer Pinker took samples with the assistance of a detective at the General Receiving Hospital and then made analysis thereof, and, to the prejudice of Kemp, testified as to the results. He was not able to exclude Mr. Kemp by reason of these tests. This amounted to an unlawful search and seizure, in violation of both the Fourth and Fifth Amendments to the Constitution of the United States, it amounted to a denial of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, and such conduct is denounced in the case of *People v. Cahan*, 44 Cal. 2d 434, which case announced the exclusionary rule for the first time in California, and which case was approved by this Court in *Elkins v. United States*, 364 U. S. 210. Such conduct has also been denounced in the case *Rochin v. California*, 342 U. S. 165.

## ARGUMENT.

### I.

**The Court Erred in Permitting the Defendant to Proceed to Trial on the Indictment Charged in Count I, Murder of Marjorie Hipperson on or About June 10, 1957; Count II, Forcible Rape of E. Helen Shelton on or About July 15, 1959; Count III, Kidnaping E. Helen Shelton on or About July 15, 1959; Count IV, Forcible Rape of Lelah D. Sherman on or About May 12, 1959; and Count V, Rape on or About May 12, 1959, of Lelah D. Sherman, When the Common Elements of Intent, Persons Involved, Time and Place Were Lacking. The Accused Was Thus Denied That Fair and Impartial Trial Guaranteed by Due Process as Provided by the Fourteenth Amendment to the Constitution of the United States.**

The Indictment alleged that the defendant committed the offense of murder of Marjorie Hipperson on or about June 10, 1957 in Count I; forcible rape of E. Helen Shelton in Count II on July 15, 1959; kidnaping of E. Helen Shelton in Count III on or about July 15, 1959; forcible rape of Lelah D. Sherman on May 12, 1959 in Count IV; and rape of Lelah D. Sherman in Count V on or about the 12th day of May, 1959.

The multiplicity of charges and mass trials has been repeatedly condemned, and it appears to have been inherited from proceedings which occurred in the Mid-European countries, and such trials and proceedings have always been frowned upon in this country.

The Legislature has seen fit by the enactment of Section 948 of the Penal Code[1] to restrict the rules of criminal proceedings as they are outlined in Sections 948 through 973. The first pleading is, of course, by Information or Indictment under Section 949 of the Penal Code. It appears to us that the Legislature being fully aware of the minimum procedural standards required by the due process clause of both the State and Federal Constitutions, has set out quite clearly what shall and what shall not be fair and proper under the rules relating to criminal pleading. It is our contention that the accusatory pleading shall not embrace and cannot include more than one offense in each charge (see Penal Code, Sections 950, 951 and 952); it is true Section 954 of the Penal Code permits the charging of one or more offenses in the accusatory pleading, but only in separate counts, and only when such offenses are connected together in their commission. In effect, they must be different statements of the same offenses, or different offenses of the same class of crimes or offenses. It is our contention that Section 954 of the Penal Code does not permit the prosecution to file an accusatory pleading, whether it be by way of information or indictment, relating several unrelated offenses in different counts, such as in the present case involving a murder absolutely unrelated to any of the other offenses which occurred on June 10, 1957, and then in the same pleading charge in Count II forcible rape more than two years later on July 15, 1959; in

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[1]Sec. 948. Forms; rules for determination of sufficiency of pleadings

FORM OF AND RULES OF PLEADING. All the forms of pleading in criminal actions, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed by this Code.

Count III, kidnaping as of July 15, 1959, more than two years from the date of the first count; forcible rape in Count IV as of May 12, 1959, almost two years later than the date in the first count; in Count V, rape as of May 12, 1959, almost two years later. Of course, Counts IV and V related to the same person, Lelah D. Sherman. The defendant was, of course, acquitted of Count IV, forcible rape.

In the earlier decisions on this subject, the provisions of Section 954 of the Penal Code were held to be jurisdictional, for in the case of *People v. O'Connor*, 181 Cal. App. 506, the reviewing court in reversing the judgment of conviction relied upon *McElroy v. United States*, 164 U. S. 76, 41 L. Ed. 355. In that case the Supreme Court of the United States pointed out the pitfalls and the prejudices resulting to an accused on trial where a multiplicity of unrelated offenses are charged in the same accusation, stating that the accused thus was deprived of a fair trial as guaranteed to him by the due process clause of the Constitution of the United States (Fourteenth Amendment). The court said:

> "It is admitted by the government that the judgments against Stufflebeam and Charles Hook must be reversed, but it is contended that the judgments as to the other three defendants should be affirmed, because there is nothing in the record to show that they were prejudiced or embarrassed in their defense by the course pursued. But we do not concur in this view. While the general rule is that counts for several felonies of the same general nature, requiring the same mode of trial and punishment, may be joined in the same indict-

> ment, subject to the power of the court to quash the indictment or to compel an election, such joinder cannot be sustained where the parties are not the same, and where the offenses are in no wise parts of the same transaction, and must depend upon evidence of a different state of facts as to each or some of them. It cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions. The order of consolidation was not authorized by statutes, and did not rest in mere discretion."

The *O'Connor* case, we suggest, was the recognized standard of fairness as late as 1940. Mass trials or trials upon a multiplicity of unrelated offenses have been held to be error as late as *People v. Davis*, 42 Cal. App. 2d 70, 108 P. 2d 85, but later was held to be error not of a "jurisdictional" kind as theretofore held, but only "procedural". This seemed to be the ruling in *People v. Van Bibber*, 96 Cal. App. 2d 273, 215 P. 2d 106.

It is our contention that some recent cases notwithstanding, it is imperative that in order that a defendant be given a fair trial, he should not be tried on unrelated offenses. We do not believe it can be rationally argued that in the murder count of Hipperson, conviction was not unduly influenced by the acts as set forth and offered in evidence in support of Counts II, III, IV and V. Those counts were unrelated to the murder, and could not but have unduly influenced the jury to the prejudice of this defendant-appellant.

In *People v. Renier* (1957), 148 Cal. App. 2d 516, 306 P. 2d 917, the court held that Section 954 of the Penal Code allows a joinder of counts in the same accusatory pleading (indictment or information) when the offenses are so connected together in their commission; or where the different offenses grew out of the same transaction, such as Counts IV and V of this very Indictment; or where the offenses charged are of the same class, or where there is a common element of sufficient substantial importance in their commission as to justify there being included in the same pleading. In *Renier, supra*, the court held it was error to try an accused before the same jury on charges of robbery and driving an automobile without consent of the owner, even when the gun identified as having been used in the robbery was found in the accused's automobile.

It has been said that where two or more offenses are charged in one indictment, information or complaint, the pleading should show on its face that the offenses are legally joinable.

*People v. Plath*, 106 Cal. 227;

*People v. Degmen*, 70 Cal. App. 567;

*People v. Kochn*, 207 Cal. 605.

It does not appear upon the face of the indictment here that sufficient has been pleaded to show that the joinability is evident from the meager facts pleaded.

In *People v. Davis*, 42 Cal. App. 2d 70, and *People v. Duane*, 21 Cal. 2d 71, it was pointed out that an

improper consolidation may prejudice the rights of a defendant.

We must concede, in all candor, that no objection was made by demurrer, motion for severance, or other objection at the time of arraignment nor until the motion for new trial, concerning the misjoinder of the offenses as we have hereinbefore set forth, but it is our contention that regardless of that, it is both the duty of the district attorney and the trial judge to see that a defendant is fairly tried, and the State cannot idly sit back and take advantage of procedural or other defects which deprive a defendant of a fair trial, and then excuse these invasions of a defendant's rights by saying he did not object.

As was said in *People v. Sheffield*, 108 Cal. App. 721:

> "It is the duty of the district attorney, not to obtain convictions, but to fully and fairly present to the court the evidence material to the charge upon which the defendant stands on trial, and it is the solemn duty of the trial judge to see that the facts material to the charge are fairly presented and the constitutional guaranties of a defendant neither violated nor infringed. There is nothing that arouses the conscience of the American public so much as interference with, or deprivation of, constitutional guaranties."

II.

**The Evidence Was Insufficient to Establish Count I, the Charge of Murder. The Defendant-Petitioner Was Not Competent to Form an Intent. The Supreme Court Erred in Holding That the Evidence Was Sufficient, and in Particular in Denying to This Petitioner a Hearing as Prayed for in the Writ of Habeas Corpus, or, in the Alternative, for a Writ of Error Coram Nobis, or for a Rehearing.**

We have carefully analyzed the testimony in this case. With argument and all the record is in excess of 2000 pages,[1] and we will not here repeat the evidence except to say that with reference to the charge of the murder of Miss Hipperson, all that can be said is that the evidence shows that there was, in the opinion of a policeman trained in the study of fingerprints and palm prints, a latent palm print which, in his opinion, was found on the wall near the bed in which the body of Miss Hipperson had been found. Various tests were made of various articles; tests were made of spots; blood was taken from the defendant without his consent, analyzed, and no definite opinion was given on this, even. It was highly speculative. There was some statement by Kemp that he had not been in the vicinity; there was some evidence that at some time he might have been in the vicinity. There were no conflicting admissions or statements by Kemp concerning the murder of Miss Hipperson. At all times when he would speak, which was seldom, he denied killing anybody; specifically denied killing Miss Hipperson when he was accused of it. The evidence of the psychia

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[1]See Summary, Appellant's Opening Brief, California Supreme Court (Record on Appeal).

trists on behalf of the defendant, who were men of learning and accredited in the field of psychiatry, was all to the effect that if Kemp in truth and in fact had committed the offense, he was unable, in their opinion, to determine and form an intent, which was a required ingredient of the crime; neither was he able to determine right from wrong, nor to determine the consequences of his acts. While it is true that the psychiatrists for the State, qualified men too, stated that in their opinion Kemp was sane and could have formed an intent, one doctor, thoroughly qualified, Dr. James Solomon, in behalf of the defendant-appellant, stated he had spent some 35 to 40 hours in the examination of Kemp before he formed his opinions. True, his testimony, unshaken in the slightest, met with a savage attack because he apparently dared to give his opinion in opposition to that of the State appointed doctors. Despite this, his opinion was unshaken, and this being an automatic appeal, the California Supreme Court was empowered, we suggest, to thoroughly review the testimony, if indeed it is not required to do so by the statute relating to automatic appeals where the death penalty is invoked. We earnestly suggest that the testimony in this case does not establish: first, that Kemp did commit the murder; secondly, if he did, that he was legally sane, that he was able to form an intent, that he was able to determine right from wrong. We earnestly suggest that the conviction of the murder should be reversed.

In connection with this point, it is true that the jury had presented to it the question of sanity, and who is there who can possibly urge that the appellant here was not prejudiced in the mind of the jury by the testimony relating to the other women.

We cite no case here as to the insufficiency of the evidence, for the reason that each one of these cases must depend upon the evidence presented and no definite standards have ever been fixed by which one can properly measure the sufficiency of the evidence, and we urge that in a case of this nature involving the death penalty and where the evidence is purely circumstantial, that the evidence should be resolved in favor of the defendant-appellant, especially where the only reasonable deduction, we contend, that can be made of all of the evidence is that it points to the innocence of this defendant rather than to his guilt.

**The Supreme Court Erred in Holding That the Evidence Was Sufficient, and in Particular in Denying to This Petitioner a Hearing as Prayed for in the Writ of Habeas Corpus, or, in the Alterantive, for a Writ of Error Coram Nobis, or for a Rehearing.**

The Petition for Writ of Habeas Corpus, or, in the alternative, Error Coram Nobis, was filed July 28, 1961, before the Supreme Court of the State of California, in that Court's Criminal No. 6946, and was denied August 9, 1961. A copy of the Petition is before this Court and is contained in the supplemental record recently forwarded to this Court, to which we respectfully direct the Court's attention.

It will be borne in mind that this petitioner asked this Court for an extension of time within which to file a Petition for Certiorari and for a Stay of Execution. This Court granted both petitions and at that time the State of California opposed the granting thereof and, in effect, contended that the petitioner Kemp was sane enough to be executed. However, on the eve

of his execution, and as one might well say, in "the nick of time", this Court granted a stay and suddenly the Warden of San Quentin Prison was confronted with medical testimony which establishes without any reasonable basis for dispute now that this man has not been competent for some time to form an intent. Dr. David G. Schmidt, Chief Psychiatrist at the California State Prison, at San Quentin, made a report to the effect that recent "EEG brain wave studies support the clinical manifestations that this man had not been and is not fully responsible."

That new matters have come to the attention of the attorneys for this petitioner, and particularly a neuro-psychiatric summary, dated June 16, 1961, and signed by Knute Hoegh Houck, M. D., Chief Psychiatrist, California Medical Facility, a portion of which is as follows:

> "There is little doubt that in this patient there was an underlying schizoid personality, along with some periods of relative depression and exaltation. In addition to the history of the football and baseball head injuries, it might be pointed out that he was an instrument baby and that there was a serious broncho-pneumonia in his first year which left him weakened and somewhat somnolent for a period of about two years thereafter. A recent electroencephalograph has been done and interpreted since May 24, with evidence of frontal lobe abnormality concerning the electro-cortico activity there. The clinical picture which has been present ever since the patient has been at San Quentin and which is present today is that of a schizophrenic reaction with catatonic and depressive features. There is considerable likelihood that this

> condition was responsible for his somewhat bizarre behavior over the several years of his marriage and previously. His unwillingness to cooperate with his attorney is apparently the effect of his mental illness, although according to the tests for legal insanity or for sanity as applied on Condemned Row, there is no doubt that he is fully aware that he has been convicted of a homicide and that he has been sentenced to execution for that crime."

There has also come to the attention of petitioner's attorneys a report from David G. Schmidt, M.D., Chief Psychiatrist at the California State Prison, at San Quentin, to F. R. Dickson, Warden, which indicates positively that the four series of EEGs have been considered in conference by the doctors and that there are abnormal findings which did not show up in the two series of EEGs run at the time of this man's trial. The report states further as follows:

> "Our EEGs show evidence of post-traumatic damage, probably associated with the injuries this man received when he was 14 and 16 years of age, that caused him to have the confusion, some disorientation and euphoria which we have seen clinically in this man during most of his stay with us on Condemned Row and in the hospital. These EEG brainwave studies, therefore, support the clinical manifestations that this man has not been and is not fully responsible."

The foregoing is newly discovered evidence and supports the contention which has been made from the beginning that this man was schizophrenic, suffering from a dual personality, and was not either conscious or responsible for his acts. This is newly discovered

evidence and as of such a character as, we contend, should have prompted the Supreme Court of California to recall the remittitur, grant the petition for habeas corpus and rehearing, grant this man a hearing, and send this case back to the trial court for a trial upon the issue of "not guilty by reason of insanity." This was evidence which could not have been obtained sooner and was not obtained, notwithstanding at least five psychiatrists have examined this man, but for some reason they did not detect the injury to his brain, notwithstanding his mother had complained that this boy was injured as a youth in a football game.

Recently, the United States Court of Appeals for the Ninth Circuit, in the case of *Schmidt v. United States*, 259 F. 2d 125, held that the petitioner in that case was entitled to a hearing upon the issue of his insanity and the lower court was held in error for refusing such a hearing.

We respectfully contend that, in the light of this evidence now developed, the Supreme Court of California fell into error and that it should be directed to hold a hearing and to determine and rule that this man is entitled to a re-trial upon the issue of "Not guilty by reason of insanity." To fail to do so amounts to a denial of due process of law, in violation of the Fourteenth Amendment to the Constitution. It would be a dreary prospect indeed for those who believe in due process to permit a man to be executed whom the State's own doctors now hold that they have discovered after long investigation and examination that this man is not entirely responsible for his acts. To the credit of California and the Warden of the Penitentiary, as we have heretofore advised this Court, a hearing has been ordered and a trial upon the present sanity

of this defendant, and such will be held in Marin County, California, in due course. But that does not satisfy the requirement that due process demands that this man be given a re trial on the question of "Not guilty by reason of insanity." If the jury had had the information before it that is now available, it is reasonable to believe that their verdict would have been entirely different from that which it was.

III.

**The Taking of Blood Samples and Secretions From Kemp and the Use in the Trial of the Testimony of Officer Pinker With Reference to the Results of Such Tests Amounts to an Unlawful Search and Seizure. It Was an Act in Violation of the Privacy of the Defendant and Constituted Violations of the Fourth and Fifth Amendments to the Constitution of the United States, and in Fact Article I, Section 19, of the Constitution of the State of California, to Which the Supreme Court of the State of California Apparently Gave Little Attention.**

Officer Pinker testified he was a forensic chemist Los Angeles Police Department, and that on June 10, 1957, he saw a body on the bed in the bedroom which was that of Miss Hipperson. He observed the body and, as has been previously described in this petition, took a sample of fluid of the vagina, made chemical tests, and he procured a sample of blood from her and made an examination for blood group, found the victim's blood to be "O". He was unable to get a blood group from the semen. However, on July 17, 1959, he met Detective Close at General Receiving Hospital, where they obtained a sample of blood from the defendant. Prior to this he had obtained a sample of

saliva from the defendant at the Crime Laboratory. He was present when the blood sample was taken from the defendant [Rep. Tr. pp. 872-873]; the defendant sat down on a table; a nurse put a rubber tube around his arm, inserted a hypodermic needle attached to a syringe, and withdrew some of the blood, transferred that blood to a vial and turned it over to Sgt. McCaulley and himself of the Crime Laboratory; the defendant sat there mute while this was done. He analyzed the blood that was taken from the defendant [Rep. Tr. pp. 873-874]. He stated that he examined the blood taken from Mr Kemp and that it was of the blood group A; he stated that a secreter is either agglutenagen A or agglutenagen B or both, whichever happens to be present in the blood and it is also found in the secretions of that person. In a non-secreter the agglutenagen genes are present in the blood but are not found in the secretions; that by secretions from that person he meant saliva, urine, seminal fluid, tears, milk, anything in the nature of a secretion from the body; he found from an examination of the spermatozoa from the vagina of Marjorie Hipperson that it was a non-secreter type; he was unable to determine the presence of either agglutenagen A or agglutenagen B which left the identity of the person whose semen it was to be O because in O it is either of agglutenagen A, B-A or B that are present which meant that the fluid that came from a non-secreter was any of the three groups, A, B or A-B. He stated that he determined from the saliva of Mr. Kemp that he was a non-secreter. He stated on that basis the tests are used for exclusion; that you cannot positively identify a person from that type of test. In other words, you can't say it was a certain person, but he couldn't exclude him either. He

was not able to exclude Mr. Kemp by reason of these tests [Rep. Tr. pp. 878-879].

It is apparent from this that these samples were taken from Kemp without his permission, and the record in this case shows from the psychiatrist, and certainly from the recently discovered evidence to which we have heretofore directed the Court's attention, that here was a man who was not responsible, and even had he consented to the taking of such samples, such consent would be valueless. The man was not competent to consent to such a search or invasion of his privacy. He could not in any fashion waive any of his rights. Due process of law includes the right to a fair and deliberate trial conducted in substantial conformity to law and in an atmosphere of calm, judicial consideration. See *Powell v. Alabama*, 287 U. S. 45, 77 L. Ed. 158.

California in 1955 adopted the exclusionary rule in a far-reaching decision (*People v. Cahan*, 44 Cal. 2d 434), and such decision has been recognized by this Court itself with approval.

In *Elkins v. United States* (decided June 27, 1960), 364 U. S. 216, this Court said:

> "The experience in California has been most illuminating. In 1955 the Supreme Court of that State resolutely turned its back on many years of precedent and adopted the exclusionary rule. *People v. Cahan*, 44 Cal. 2d 434, 282 Pac. 2d 905."

The value and effect of this decision was recognized by the Chief Law Enforcement Officer of the State of California, Governor Edmund G. Brown, who was Attorney General of the State of California at the time of *Cahan* decision. (See Stanford Law Review, quoted

in Note 9 Stan. L. Rev. 515, 538. See also Barrett, Exclusion of Evidence Obtained by Illegal Searches—A Comment on *People v. Cahan*, 43 Cal. L. Rev. 565, 586).

See also *Rochin v. California*, 342 U. S. 165.

## Conclusion.

Wherefore, petitioner respectfully prays that a Writ of Certiorari be granted, directed to the State of California, to the end that a full hearing may be had herein, and to the end that this petitioner be granted a new trial, in particular upon the issue of "Not guilty by reason of insanity." This does not mean we are receding from the other points raised herein, particularly the unlawful search and seizure and the invasion of the privacy of this man who was mentally ill at the time the fluids were extracted from his body; and for such other and further relief as to the Court may seem meet and just in the premises.

Respectfully submitted,

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DANIEL N. BUSBY,
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## APPENDIX A.

### Opinion of the District Court of Appeal.

In the Supreme Court of the State of California, in Bank.

The People of the State of California, Plaintiff and Respondent, v. Darryl Thomas Kemp, Defendant and Appellant. Crim. 6632.

Filed March 2, 1961.

By indictment, defendant was charged with the commission of five felonies. In count one he was charged with the murder of Marjorie Hipperson on June 10, 1957. Count two charged the forcible rape, and count three the kidnaping of E. Helen Shelton, on July 15, 1959, while count four charged the forcible rape of and count five rape accomplished by threats of bodily harm to Lelah D. Sherman on May 12, 1959. As to all offenses defendant pleaded not guilty and not guilty by reason of insanity. The jury acquitted defendant of the charge contained in count four, but convicted him of murder in the first degree (count one), of the rape and kidnaping of E. Helen Shelton (counts two and three) and of the rape of Lelah D. Sherman as charged in count five. Thereafter the jury found defendant sane at the time of the commission of the offenses, and, in the separate proceeding required by section 190.1 of the Penal Code, imposed the death penalty on count one. The appeal is automatic under the provisions of section 1239, subdivision (b), of the Penal Code.

In view of the insanity plea, the court under the provisions of section 1027 of the Penal Code,[1] at the time of plea, appointed Doctors Bailey and Smith, two qualified alienists, to examine the defendant and to report to the court as to his sanity. These doctors subsequently reported to the court that, while defendant was a sex psychopath, he was, in their opinion, legally sane at the times of the commission of the offenses and at the times of their examinations.

Also before trial, Dr. Gore, a qualified psychiatrist, under the provisions of section 1871 of the Code of Civil Procedure,[2] was appointed by the trial court to examine defendant with instructions to report to the court his findings as to the defendant's mental status. Dr. Gore thereafter, and prior to trial, rendered a written report in which he opined that defendant is a sadistic rapist, a sexual psycopath and sexual deviate, is emotionally immature and lacks responsibility, but concluded that defendant was legally sane at the time of the commission of the crimes, and was sufficiently sane to be able to cooperate with his counsel in the preparation of his defense. A Dr. Solomon, also a qualified psychiatrist, retained by defendant, reported that in his opinion defendant was mentally ill, was suffering from delusions of persecution, and was severely de-

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[1]This section requires the court, when a defendant pleads not guilty by reason of insanity, to appoint at least two alienists to examine the defendant as to his sanity. Such alienists may thereafter be called by the prosecution, the defense, or the court, to testify on the subject.

[2]This section permits the trial court, before or during the trial of any action, civil or criminal, to appoint an expert where it appears to the court expert testimony may be necessary. Such expert may be called as a witness by either party to the litigation, or may be called by the court.

pressed. He called attention to an attempt at suicide made by defendant while in jail, and concluded that defendant did not have sufficient mentality to cooperate with his counsel in the preparation of his defense, and was and is legally insane.

After these reports were filed, the trial judge stated for the record that, before appointing these experts, he had had no doubts as to defendant's then sanity but had appointed them out of an abundance of caution, and that after reading the reports of the doctors he still had no doubts as to defendant's present sanity and his ability to cooperate with his counsel in the preparation of his defense.

Prior to trial the defendant orally, and in writing, attempted to discharge his counsel and to proceed in propria persona. When this was communicated to the trial judge he interviewed the defendant in the presence of both counsel. After carefully interrogating the defendant, during which interrogation the defendant repeated his request to discharge his counsel, and during which it developed that defendant was ignorant of the rules of procedure and evidence, the trial court ruled that "while the defendant understands the nature of the charges against him, he has not had sufficient legal experience or does not have legal knowledge enough to conduct . . . his defenses and Counsel will not be relieved." This was a correct ruling, and is not challenged by appellant. The court would have violated defendant's constitutional right to counsel had it accepted "a waiver of counsel from anyone accused of a serious public offense without first determining that he [the defendant] 'understands the nature of the charge, the elements of the offense, the pleas and defenses which

may be available, or the punishments which may be exacted.'" (In re James, 38 Cal. 2d 302, 313; see also People v. Linden, 52 Cal. 2d 1, 16; People v. Chesser, 29 Cal. 2d 815, 822, and cases cited; Uveges v. Pennsylvania, 335 U. S. 437, 440.)

The trial, in its various phases, was a lengthy one.

After rendition of the jury verdicts, the defendant moved for a new trial, which motion was denied. Thereafter, he moved to reduce the murder conviction to one in the second degree, or, in the alternative, to reduce the penalty to life imprisonment. These motions, and also a motion for the court to declare a doubt as to present sanity, were denied, the court reserving to counsel the right to present additional evidence on the latter issue. Thereafter, at the request of defense counsel, and again acting under the provisions of section 1027 of the Penal Code, the court appointed Doctors McNiel and Tutunjian, qualified psychiatrists, to examine defendant and to report to the court their opinions as to his present sanity. Both concluded and reported that, in their opinion, defendant was presently sane. The court then refused to declare a doubt as to present sanity.

The evidence produced by the prosecution substantially supports the findings of guilt on all four counts of the indictment on which appellant was found guilty. The sufficiency of that evidence is not challenged except as to the murder charge, and then only on the ground that premeditation and malice were not sufficiently shown.

*The facts in reference to the charge involving the murder and rape of Marjorie Hipperson.*

The evidence shows that Marjorie Hipperson was raped and murdered sometime during the early morning hours of June 10, 1957. Prior to her death Miss Hipperson lived in an apartment in Los Angeles, was employed as a nurse in a nearby hospital, and was engaged to be married to Dr. Deike, an intern at the hospital. On the evening of June 9, 1957, the employees at the hospital gave a combined stag party and shower for Dr. Deike and Miss Hipperson. At about 11:30 p.m. Miss Hipperson left the hospital in her automobile, alone, stating that she was going to her apartment, alone, stating that she company her because he was on The doctor could not accat night. The next morning, duty at the hospital thdid not show up for work. Dr. when Miss Hipperson drtment to investigate. He dis- Deike went to her apart door to the apartment was covered that the frontle (there was no back door), chained from the inside removed from a rear window, that a screen had been as open. He entered the apart- and that the window wasow and discovered the dead body ment through that windong on the bed in her bedroom, of Miss Hipperson lyingck with her nightgown bunched She was lying on her backbody. There was a stocking up around her upper beck, another stocking wrapped wrapped around her nec washcloth near her face. Her around one wrist, and a vshe had numerous other bruises mouth was bruised, and sler body. Subsequent investiga- on different parts of her had been raped, and had died tion disclosed that she h

of strangulation. It was obvious that the washcloth had been used as a gag and that the stocking on her wrist had been used to tie her hands. Investigation by fingerprint experts disclosed a portion of a palm print on the wall beside the bed, which had been pulled out from its normal position, and another palm print on the window ledge where entry had obviously been made. The palm print on the wall was about 18 inches directly across from the buttock of the victim, and the palm print on the window ledge showed that the fingers were facing into the house when the print was made. These prints, according to the experts, had been made within 48 hours of their discovery, which was on June 10, 1957.

After appellant's arrest in July of 1959, prints were taken of his palms, and the prints taken from Miss Hipperson's room exactly matched them. The expert testified that the prints in the room were those of appellant, could not possibly have been made by any other person, and that it is not possible for two different human beings to have the same palm prints. Palm prints, so he testified, are as trustworthy as fingerprints as a means of identification. He was positive that the prints were those of the appellant.

An examination of the vaginal orifice of the body disclosed the presence of seminal fluid, and tests of that fluid disclosed that it was seminal fluid of the male with spermatozoa present in the fluid. Tests of that fluid and, after his arrest, tests of appellant's saliva and blood, disclosed to the experts that the seminal fluid was of a type that could have been that of appellant. This, like the usual blood test, is an exclusionary test—it does not positively identify the person,

but it may exclude the person suspected. The test showed that appellant could not be excluded.

The autopsy established the cause of death as asphyxiation due to strangulation. The lacerations in and about the vagina, and the presence of the semen and spermatozoa indicated a forcible entry into the vaginal canal.

The fact that appellant was familiar with the apartment where Miss Hipperson lived was established by the testimony of Marie Weber, who lived in the apartment directly across from that of Miss Hipperson. She testified that sometime in 1950 a hand-printed note was slipped under the door of her apartment. This note stated that the writer had observed Miss Weber undress, that he had seen her body, and suggested that they get together for mutual satisfaction. Miss Weber reported the incident to the police and kept the note until after Miss Hipperson's murder, when she again told the police about it. After appellant's arrest, specimens of his handwriting were secured, and a handwriting expert testified that the note had been printed by the appellant.

*Facts as to the rape of Lelah D. Sherman on May 12, 1959.*

As to this charge there is no doubt of the identification of defendant. Mrs. Sherman testified that on May 12, 1959, she was in Griffith Park in Los Angeles, sketching. At about 3:45 p.m. she started to walk towards her bus stop, when appellant, whom she positively identified, drove up beside her and offered her a ride. When she got in the car appellant turned the car around and started towards the mountains. When

Mrs. Sherman protested he told her that he wanted to show her the view because there were nice things to sketch up there. When they were high in the hills appellant stopped the car and Mrs. Sherman got out. Appellant indicated to her a path and told her that the view was in that direction. When she had progressed down the path a short distance he told her to stop, and started to push her. He then told her that resistance was useless, and that she might as well do what he wanted because otherwise he would throw her down the mountain, which was very steep in that area. She was frightened. He forced her to the ground. She tried to resist but he held her with one hand while he removed her slacks and panties with the other, took off his pants, and had intercourse with her. After the act was completed she was very frightened and did not know how she was going to get away. She got up from the ground, put on her clothing, and started to walk up the path. Defendant then offered to drive her to her bus station. Because they were far up in the mountains she got back in the car. On the way down the mountain appellant asked her if she liked to dance. Thinking that she could entrap him, she said that she did like to dance, and arranged to meet him the next Saturday night at the drugstore at Hollywood and Vine. When they came to Vermont Avenue and Sunset she asked to be let out of the car, and appellant stopped. She jumped out, ran over to a restaurant, and immediately telephoned the police. When the police arrived she told them of the rape and about the arrangements made for the next Saturday night. At the suggestion of the police she kept the date as she had arranged, but appellant did not appear.

*Rape and kidnaping of E. Helen Shelton on July 15, 1959.*

As to these offenses the identification of appellant was positive and the evidence of the commission of the acts overwhelming. Mrs. Shelton, who was also a nurse, testified that about 5:20 p.m. on July 15, 1959, she was driving through Griffith Park in an isolated area when defendant passed her in a green jeep truck and forced her to stop. Appellant, whom the witness positively identified, approached Mrs. Shelton's car, identified himself as a park attendant, told her that the road was closed and that she would have to turn around. While saying this he approached her car. Both doors were locked, but the window on the driver's side was down. Appellant reached in and opened the door. He grabbed her by her hair and threw her down in the street. He then beat her head on the street and said: "I am going to kill you; you are going to die." He beat her until she went limp. Appellant then dragged her to a secluded area and threw her down and kicked her. He ripped off one of her stockings and tried to put it around her neck. He then said: "Oh, damn, it is too short, there is not enough." He then ripped off part of her clothing and told her, in unmistakable language that he was going to rape her. He kept beating her and threatening to kill her. Just before she lost consciousness she heard him say: "I am going to murder you. I am going to murder you like I did the Hipperson woman."[3] Appellant then hit the witness with a rock and choked

[3]It should be noted that Mrs. Shelton was interviewed by the police in the hospital shortly after these events. She did not then tell the officers that her assailant had mentioned the Hipperson murder. She did, however, then tell the police that her assailant had said: "I am going to kill you and I have killed before."

her until she lost consciousness. She was not conscious when the rape was actually perpetrated. When she regained consciousness she had severe pains in her vaginal area and defendant was gone. She crawled up the path.

About this time two persons were driving along in their car in the general area. They saw the appellant running toward them and, when he approached their car, appellant directed them to turn around, stating that the road was closed. About this time Mrs. Shelton appeared from the side of the road ran toward the witnesses' car and yelled "Stop that man attacked me . . . This man has raped me." Appellant ran over to his pickup truck, started up, and tried to run Mrs. Shelton down, very narrowly missing her. Mrs. Shelton was able to see most of the license number of the car.

Mrs. Shelton's clothes were in disarray and torn. She asked the witnesses to get her to a hospital. They drove to the nearby observatory and called police. The police testified that she was bruised and bleeding when they arrived, and that she told them she had been raped. They took her to the receiving hospital. There smears were taken and an examination made. She had undoubtedly been raped. There was semen and spermatozoa in the vaginal area. She had suffered a severe and brutal beating. She was in the hospital for a week and, at the time of trial (November, 1959), was still under the care of a physician.

It should also be noted that in his argument to the jury the prosecutor very fairly stated that he was not going to rely upon Mrs. Shelton's statement that appellant had mentioned Miss Hugerson, but did, quite properly, argue that she had told the police that appellant had stated he had murdered before.

*Arrest of appellant.*

Mrs. Shelton had given a good description of the pickup truck used by appellant. This description was broadcast to the police. About 10:15 that same night, July 15, 1959, a Los Angeles officer saw such a car, chased it for three blocks, and finally caused it to stop. The truck driven by appellant was loaded with personal belongings, including a shirt and a pair of overalls similar to those described by Mrs. Shelton as being worn by appellant during the attack. The officer arrested appellant and then requested a rebroadcast of the description of the vehicle of the rape suspect. Up to this time appellant had been very self-assured, but his attitude abruptly changed when he heard the requested rebroadcast. He then sat down on the curb with his head in his hands and refused to talk.

*Extrajudicial statements of appellant.*

The next morning, July 16, 1959, Sergeant Close of the police department had a conversation with appellant. In that conversation appellant admitted that he had beaten Mrs. Shelton and expressed regret. He claimed, however, that he had not raped her. He explained the beating by saying that Mrs. Shelton had repulsed his advances and that he had become angry. He said that when arrested he was on the point of leaving the Los Angeles area to go to San Jose to look for work. In the early evening of that day appellant again was interviewed by Close and again made the admissions he had made in the morning. Up until this time the officers had only talked to appellant about the Shelton rape.

By late in the evening of July 16, 1959, the officers had connected appellant with the Hipperson murder through the medium of the palm prints. Close and Lieutenant Earl then, that same evening, had another conversation with appellant. They told him that they had information that appellant had been involved in other crimes, and, in particular, with the Hipperson murder and rape because of the palm prints. Appellant did not answer the accusation. Thereupon Lieutenant Earl, in some detail, reconstructed the Hipperson murder as he believed it had happened. Then appellant denied that he had killed any woman. The officers continued to accuse him of the murder and rape and he continued to deny that he had killed anyone, and denied that he had ever been near or in the apartment of Miss Hipperson.

The officers testified that, whereas in the earlier conversations appellant seemed eager to talk, in fact at least one of the conversations had been at his request, as soon as the Hipperson case was mentioned, there was an abrupt change in his attitude. He became silent, uncooperative and sullen.

Defendant did not elect to take the stand in his own defense in any portion of the trifurcated trial. However, he did present some witnesses. Several of them were members of his family. Through them, and through expert witnesses, he sought to prove, first on the trial of the guilt issue, that he did not have sufficient mentality to form the intent to commit any of the crimes charged, second, on the insanity trial, that he was insane, and third, on the penalty portion of the trial, that the death penalty should not be imposed because of his mental condition.

His mother, father, wife and other members of the family, testified as to a head injury suffered by appellant in a football game in 1951, and stated that thereafter he became forgetful, morose and committed some strange acts. They also testified as to his strange behavior in not recognizing or communicating with them after his arrest on the present charges. Evidence was introduced that he and his wife could not have children and that they attempted to adopt a child who was taken from them, and of appellant's obvious mental distress when this occurred. His wife testified as to his waking up in the middle of the night and taking long automobile rides without explanation. Several deputies in the public defender's office testified as to appellant's strange behavior after his arrest, and of their inability to communicate with him. Several doctors testified that, in their opinion, he was medically and legally insane to such an extent that he could not form the required intent as to any of the crimes. One psychiatrist, a Dr. Thompson, had examined appellant in May of 1957, before any of the crimes here involved had been committed. He testified, on the guilt portion of the trial, that as a result of the examination then made he had formed and expressed the opinion that appellant was then suffering from a psychoneurosis. He stated that appellant was then in a chronic, constant state of anxiety, and had basic disturbances in his behavior pattern. At that time he recommended psychiatric treatment. He did not see appellant again until after his arrest. At that time he found appellant to be lethargic and depressed, and almost mute. Appellant did not recognize the doctor and seemed to be living in the past. The doctor

was unable to secure any relevant information from appellant. The doctor found that appellant's memory and perception were impared and completely disoriented with the present. Dr. Thompson stated that in his opinion appellant was not malingering, was schizophrenic, and that, at the time of the commission of the various acts charged, was in such a mental condition that he could not have formed the intent to commit the various acts charged, and could not have premeditated any of them.

Another psychiatrist, a Dr. Solomon, examined appellant after his arrest. He corroborated Dr. Thompson as to his then condition, and found it extremely difficult to communicate with appellant. He, too, was of the opinion that appellant, on the pertinent dates, was in such a mental condition that he could not form the intent or could not have premeditated the commission of any of the charged acts.

On the insanity trial similar evidence was introduced to show that appellant was insane, and this same type of evidence was introduced on the penalty portion of the trial to support the contention that the death penalty should not be imposed.

As opposed to his evidence the prosecution produced several experts who testified that at all relevant times appellant was legally sane and consciously and knowingly premeditated the commission of each of the crimes involved. They opined that the symptoms testified to by the defense doctors were the result of conscious malingering on the part of appellant in an attempt to escape the death panalty.

*Premeditation.*

Appellant contends that the evidence is insufficient to support the finding that the murder was of the first degree. Although appellant claims that the palm print evidence was inconclusive, the expert testified that the identification was positive and absolute. The expert also testified that the palm prints had been made within 48 hours of the murder. This placed defendant in the Hipperson apartment sometime within 48 hours of the time Miss Hipperson was killed.

Appellant places his main reliance in support of his contention that the evidence does not support the finding of first degree murder on the testimony of the psychiatrists produced by him who testified that appellant, in their opinion, at the time these crimes were committed, was in a mental state which they classified as "unconscious," and mentally unable to form the requisite intent to commit such crimes. Appellant concedes that the prosecution experts testified to the contrary, but argues that his psychiatrists are more entitled to belief than those of the prosecution because their examinations were more lengthy and detailed. This is a frank suggestion that this court should reweigh the evidence. This, of course, we cannot do. Even if this court were of the opinion that the evidence produced by appellant was reconcilable with innocence, if the jury, on conflicting evidence, has found to the contrary, the reviewing court is powerless to interfere. (People v. Newland, 15 Cal. 2d 678, 681, and cases cited therein; see also People v. Brubaker, 53 Cal. 2d 37, 40.)

In the instant case the four qualified psychiatrists who testified for the prosecution, based on their examinations and upon the evidence at the trial and before

the grand jury, opined that appellant entered the Hipperson apartment with intent to rape Miss Hipperson and that he then knew the difference between right and wrong, that he then realized the nature and quality of his acts and was capable of forming the specific intent required. This testimony was believed by the jury, and its finding is conclusive.

Once it is established that appellant was mentally able to premeditate the crime here involved, there is no doubt but that the evidence supports the finding that the murder was one in the first degree. "Murder is the unlawful killing of a human being, with malice aforethought." (Pen. Code, § 187.) Malice may be express or implied. "It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (Pen. Code, § 188.) It is also provided that: "All murder which is perpetrated by means of . . . any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate . . . rape . . . burglary . . . is murder of the first degree. . . ." (Pen. Code, § 189.)

There can be no doubt at all that the evidence supports the finding that this was murder in the first degree. The evidence demonstrates almost to a certainty that appellant entered the Hipperson apartment after first removing the screen from the window; that he entered with the intent to commit rape upon the occupant; that he entered the bedroom where he found Miss Hipperson in bed; that he tied a stocking around her

neck and another around her hands; that he gagged her with a washcloth; that he then raped her and strangled her. The fact that the defendant left by the window is indicated by the fact that the only other exit from the apartment, the front door, was chained from within. The fact that force was used, and that the victim resisted, is indicated by the multiple bruises on her body and the fact that she was bound and gagged; the fact she was raped, and forcefully so, is indicated by the condition of the body and contents of the vaginal canal.

This, and the other evidence already reviewed, supports the finding that the killing was not only premeditated, was not only wilful and deliberate, but was committed in the perpetration of a forceful rape. This evidence overwhelmingly supports the finding that the murder was one of the first degree. (See People v. Rupp, 41 Cal. 2d 371, 380; People v. Reed, 38 Cal. 2d 423, 431; People v. Moore, 48 Cal. 2d 541, 547; People v. Brubaker, *supra*, 53 Cal. 2d 37, 43.)

*Claimed error in the testimony of Dr. Gore.*

Appellant next contends that prejudicial error was committed in admitting into evidence the opinion of Dr. Gore that appellant was of a type that enjoyed sexual intercourse with a dead person, an affliction known as necrophilia. The statement of the psychiatrist to this effect did not come into the record in direct response to a question on that subject asked by the prosecution. The prosecutor asked Dr. Gore if, based on the physical facts of the case, which were included in the question, he was "able to form an opinion as to whether or not he had the intent to rape Marjorie Hipperson at the time that he had this intercourse?" Dr. Gore re-

sponded that he had such an opinion and, in response to a question as to what that opinion was, responded: "My opinion is that this man had intention to rape a woman and I asked Mr. Kemp a question which seems to be borne out in your hypothetical statement here. I asked him if he enjoyed having sexual relations with a dead person and he told me 'No.' But now I believe that the man does enjoy sexual relations with a dead person necrophilia as we term it."

This testimony came in as a natural answer to the question, and there is no indication or claim that the prosecution knew, expected, or solicited this answer when the question was asked. The defense had introduced evidence that appellant was suffering from a mental disease which caused him to become mentally unconscious at times and rendered him unable to form the conscious intent to commit rape. Dr. Gore was called by the prosecution to rebut this testimony. It was in support of his conclusion that appellant had sufficient mentality to form the intent to commit rape, that the answer about intercourse with a dead person was given. The answer so naturally followed the line of questioning that defense counsel did not object to the answer, move to strike it or ask the jury to be admonished to disregard it. Normally some such action is required or the point is deemed waived. (People v. Smith, 151 Cal. 619, 624; People v. Lawrence, 143 Cal. 148, 155; People v. Cole, 141 Cal. 88, 91; People v. Williams, 127 Cal. 212, 216.) There is nothing in the record to indicate any reason for not following this normal rule in this case. Certainly, even if allowing the testimony to remain in the record was error (and we do not think it was) under no stretch of the imagination could the error have been prejudicial.

*Joinder.*

ntentions of appellant is that it

One of the major conte indictment, in separate counts, was error to join in one ider of Marjorie Hipperson al- the charge of the murdemmitted in June of 1957, the leged to have been commidnaping of E. Helen Shelton, charges of rape and kidhommitted in July of 1959, and alleged to have been comving Lelah Sherman, alleged to the rape charges involvin May of 1959. It is contended have been committed in M Penal Code does not authorize that section 954 of the P the required common elements such a joinder in that thred, and time and place are lack of intent, persons involvedt to the contention. ing. There is no merit to enal Code provides, in part, that

Section 954 of the Penag may charge two or more dif- ".An accusatory pleading ted together in their commission. ferent offenses connected of the same offense or two or or different statements ofs of the same class of crimes or more different offenses ofe counts . . . the defendant offenses, under separate c any number of the offenses may be convicted of ated, that the court in which a case charged . . . provided, sts of justice and for good cause is triable, in the interests cretion order that the different shown, may in its discret forth in the accusatory pleading offenses or counts set fort ." be tried separately. . . . e appellant took no steps prior to

In the instant case the a challenge the indictment for mis- or during the trial to chall demur to the indictment, nor did joinder. He did not demur, nor did he object in any way he move for a severance, joint trial.[1] Under such circum- before verdict to the joint properly complain on appeal that stances he may not prop resulting in prejudice to him. there was a misjoinder resul

[1]The objection was first raised on the motion for a new trial.

Section 1004, subdivision 3, of the Penal Code, provides that a defendant may demur to the accusatory pleading before entry of plea when it appears "That more than one offense is charged, except as provided in Section 954." Section 1012 of the Penal Code provides that "When any of the objections mentioned in Section 1004 appears on the face of the accusatory pleading, it can be taken only by demurrer, and failure so to take it shall be deemed a waiver thereof" except in certain situations not here applicable. Under this section it is well settled that in the absence of demurrer or proper objection, the defendant must be deemed to have waived the point as the section expressly provides. (People v. Stone, 199 Cal. 610, 624; People v. Rankin, 169 Cal. App. 2d 150, 158.) This is so even where there is a clear misjoinder. (People v. Cummings, 173 Cal. App. 2d 721, 730.)

Had a demurrer been filed on the ground of misjoinder, or had proper objection or motion been made, then the trial court, under the express provisions of section 954 would, upon a showing of good cause or by indicating that the interests of justice would best be served by a severence, have had discretion to order the counts, or some of them, to be tried separately. (People v. Winston, 46 Cal. 2d 151, 158.) But because of the failure of appellant to take some such action the trial court was never called upon to exercise this discretion.

This is not to imply that had appellant taken some such action it would have been an abuse of the trial court's discretion to refuse a severance. Quite to the contrary, had some such motion been made, the trial court would have been justified if, in its discretion, it

had denied the objection. In People v. Chessman, 52 Cal. 2d 467, 492, after assuming that a proper objection in the trial court had been made to the consolidation of counts involving store robberies with counts involving kidnapings and sex crimes, it was said: "It appears that the situation here comes within the holdings of cases which permit joinder of offenses, even though they do not relate to the same transaction and were committed at different times and places and against different victims, where there is a common element of substantial importance in their commission. [Citing four cases.] Here the element of intent to feloniously obtain property runs like a single thread through the various offenses, and we cannot see how defendant was prejudiced by joinder of the simple robberies and robbery-kidnapings with the revolting crimes in which sex offenses were connected with robbery."

Also applicable here are the rules stated in People v. Walker, 112 Cal. App. 2d 462. There, in separate counts, the defendant was charged with the murder of one victim, with murder, kidnaping and assault with intent to commit rape on a second victim, assault with a deadly weapon on a third victim and with the kidnaping and rape of a fourth victim. The appellate court held that the trial court acted well within its discretion in overruling a demurrer to that accusatory pleading. In so holding the appellate court stated (p. 471):

"The charge of rape of Betty Maund and of assault with intent to commit rape of Doris Cook clearly belong to the same class of crimes, and the same is true of the charges of kidnaping the two women. Both rape and murder are forms of assault and both are

offenses against the person. Moreover, a joinder of distinct offenses is permissible if there is a common element of importance in their commission. (People v. Scott, 24 Cal. 2d 774.) Such a common element here appears in that the appellant was armed with the same gun and the gun was used in each set of offenses. We think a further common element may properly be said to appear in that in each instance a woman was kidnaped and a common intent is clearly disclosed. It may be said here as was said in People v. Thorn, 138 Cal. App. 714 (approved in People v. Duane, 21 Cal. 2d 71): "The legislature, it seems to us, meant by the use of the words, "the same class of crimes or offenses," in such sections, offenses possessing common characteristics or attributes, and it would seem that the different offenses set out in the information here do have many attributes in common."

In the instant case appellant contends that the joinder of the rape and kidnaping charges, committed in 1959, with the murder alleged to have been committed in 1957, were, as a matter of law, prejudicial to him. It is pointed out that the evidence on the murder charge was circumstantial while the evidence on the rape and kidnaping charges was direct and overwhelming. It is also pointed out that one of the rapes, that of E. Helen Shelton, was of a particularly brutal character and was accompanied by a very severe beating. Joining this brutal offense with the murder charge, on which the evidence was only circumstantial, so it is contended, could not have helped but prejudice the jury on the murder charge. It is also pointed out by appellant that he had made direct admissions as to the brutal beating of E. Helen Shelton, while no such di

rect admissions were made as to the Hipperson murder. These are all matters that should have been addressed to the trial court and might have been material in that court in determining whether in its discretion separate trials would be ordered. But certainly it was not prejudicial as a matter of law for the court not to have ordered separate trials of its own motion. It must be remembered that, because the evidence as to the Shelton rape was particularly revolting, in that it involved a brutal beating, this was not the fault of the prosecution. Appellant admitted brutally beating the young lady. It was he who committed those acts and he must take the consequences.

The offenses here involved were not unrelated. They possess common elements of substantial importance. The crimes of rape, and murder and kidnaping are all forms of assault against the person. It is also a fact that there was a common *modus operandi* in all of these crimes. Each crime involved a woman that appellant found who was unprotected and alone. In each crime the obvious motive was satisfaction of appellant's sexual desires. Rape of his victims was common to all the cases. In the Shelton and Hipperson cases the methods adopted were identical. In both the victim was beaten. In both appellant used a stocking of the victim in an attempt, in one case successful, to strangle his victims. The mere lapse of about two years between the murder and the other crimes does not of itself demonstrate the impropriety of the joinder. The tests are set forth in section 954. Once those tests have been met as they were in the instant case, there would not have been an abuse of discretion in denying a motion for separate trials, even if such motion had been made.

It is also the law that one asserting prejudice because of a joint trial assumes the burden of proving it. A bald assertion of prejudice is not enough. (People v. Duane, *supra*, 21 Cal. 2d 71, 78; People v. Northcott, 209 Cal. 639, 648.) While appellant asserts that the jury must have been influenced by the evidence on the rape charges in considering the murder charge, the mere assertion of that fact does not prove it. The jury was correctly instructed that the evidence applicable to each offense had to be considered as if it were the only accusation before them. It will be presumed that the jury followed that instruction. (People v. Foote, 48 Cal. 2d 20, 23.)

There was no error and no prejudice in the joint trial of these offenses.

*Evidentiary points.*

Appellant next objects to the introduction into evidence of enlarged photographs, some in color, of the nude body of the deceased, contending that they could not help but influence the jury. The introduction of these photographs was the subject of careful consideration by the trial court, and they were permitted to be introduced only after the trial court became convinced, and so ruled, that they were reasonably relevant to the issues involved. This ruling was sound. Because the evidence on the murder charge was largely circumstantial, and because the prosecution had the burden of showing malice, it was necessary for the prosecution to introduce these various photographs to show the multiple bruises on the body in order to demonstrate that force had been used. While it is true that several of these photographs depicted portions of the unclothed body of the victim, it was incumbent on the prosecution to show that violence had been used. These photo-

graphs were necessary to show such violence, and they do so. They all were of probative significance. Most of them were related to proving the method of operation of appellant and cause of death. Several of the photographs were necessary to show the position of the bed, and the location of the palm print on the wall in relation to the position of the body of the victim. The photographs were not unduly cumulative. Each had a specific purpose reasonably related to the issues before the court. Although it is error to receive in evidence gruesome photographs designed primarily to arouse the passions of a jury, such photographs, even though unpleasant, are admissible when reasonably relevant to the issues before the court. Whether the probative value of such photographs outweighs their possible prejudicial effect is normally a question that rests in the sound discretion of the trial court. (People v. Brubaker, *supra*, 53 Cal. 2d 37, 48; People v. Carter, 48 Cal. 2d 737, 751; People v. Cheary, 48 Cal. 2d 301, 312.) There was no abuse of discretion in the present case.

It is also contended by appellant that the taking of saliva and blood samples from him violated his rights under the federal and state Constitutions in that they constituted an unreasonable search and seizure, and were cruel and inhuman within the meaning of Rochin v. California, 342 U. S. 165. Both samples were taken from appellant in order to determine whether he was of the group that could or could not have deposited the seminal fluid in the vaginal tract of Miss Hoperson. The record is completely silent as to the manner in which the saliva specimen was obtained. Certainly there is no evidence that force, in any degree, was used, or that appellant in any way objected to the tak-

ing of this specimen. As to the blood sample, the evidence shows that appellant was taken by the police to a hospital where he sat at a table while a nurse put a rubber tube around his arm and withdrew some blood with a hypodermic attached to a syringe. The record shows that at no time did appellant object to the taking of the sample or to the method employed to secure it. Certainly there is nothing in the record to indicate, nor is it contended, that the samples were taken in a fashion to shock the conscience or to offend our sense of justice. Under such circumstances the samples so secured were admissible in evidence. (People v. Duroncelay, 48 Cal. 2d 766, 770; Breithaupt v. Abram, 352 U. S. 432; People v. Haeussler, 41 Cal. 2d 252, 257.)

In concluding it should be noted that the trial judge, the Hon. Herbert V. Walker, at all times was most careful to protect the rights of appellant. The record also shows that appellant was ably represented by his defense counsel, who at all times carefully protected appellant's legal rights. The prosecutor ably and fairly presented the case for the prosecution. The appellant undoubtedly was given a fair trial. The record is remarkably free from any procedural error.

The judgment and order are affirmed.

Peters, *J.*

We concur:

Gibson, *C. J.*
Traynor, *J.*
Schauer, *J.*
McComb, *J.*
White, *J.*
Dooling, *J.*

## APPENDIX "B".

Section 187, Penal Code, California:

"Murder Defined. Murder is the unlawful killing of a human being, with malice aforethought."

Section 190.1, Penal Code, California:

(Determination of Sentence):

"The guilt or innocent of every person charged with an offense for which the penalty is in the alternative, death, or imprisonment for life, shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, and has been found sane on any plea of not guilty by reason of insanity, there shall thereupon be further proceedings on the issue of penalty and the trier of fact shall fix the penalty. * * *"

Section 954, Penal Code, California:

"An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. * * *"

Section 948, Penal Code, California:

"All the forms of pleading in criminal actions and the rules by which the sufficiency of pleadings is to be determined are those prescribed in this code."

Section 1239, Subd. (b), Penal Code, California:

"When upon any plea a judgment of death is rendered an appeal is automatically taken by the defendant without any action by him or his counsel."